IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

FRIDAY, THE 19TH OCTOBER 2007 / 27TH ASWINA 1929

WP(C).No. 17850 of 2007(Y)

(AGAINST THE ORDER DT. 30/11/2006, PASSED IN EP NO. 32/2006 IN OS NO. 107/2007 ON THE FILE OF MUNSIFF'S COURT, ALATHUR)

PETITIONER:

GEEVARGHESE, S/O ABRAHAM,
'THREE LOTUS', MUDUMPURATH,
R.MANGALAM, KANNAMBRA AMSOM,
ALATHUR TALUK.

BY ADV. SRI.SAJAN VARGHEESE K.
SRI.LIJU. M.P
SRI.M.N.SAJEER

RESPONDENTS:

1. **REETHA.V.NAIR, D/O THULASI AMMA,**
   ULLATTIL, KANNAMBRA AMSOM, DESOM,
   ALATHUR TALUK.

2. **LIJU JEEVA, D/O KESAVAN,**
   PARAKKOTTUKALAM, ELANADU VILLAGE,
   NOW RESIDING AT BAGAVATHY PARAMBIL HOUSE,
   KANNAMBRA AMSOM DESOM, ALATHUR TALUK,
   PALAKKAD DISTRICT.

R2 BY ADV. SRI.JOHNSON P.JOHN
SRI.BABY MATHEW

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 19/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C) NO: 17850/2007

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1. COPY OF THE EP NO. 32/2006 IN OS. NO. 107/2005 ON THE FILE OF THE MUNSIFF'S COURT, ALATHUR.

EXT.P2. COPY OF THE OBJECTION DT. 31/5/2006 FILED BY RESPONDENT NO. 2 TO EXT. P1.

EXT.P3. COPY OF THE DEPOSITION OF PW1 IN EP NO. 32/2006 IN OS NO. 107/2005 ON THE FILE OF MUNSIFF'S COURT, ALATHUR.

EXT.P4. COPY OF THE DEPOSITION OF RW1 IN EP NO. 32/2006 IN OS NO. 107/2005 ON THE FILE OF MUNSIFF'S COURT, ALATHUR.

EXT.P5. COPY OF THE ORDER DT. 30/11/2006 IN EP NO. 32/2006 IN OS NO. 107/2005 ON THE FILE OF MUNSIFF'S COURT ALATHUR.

RESPONDENT'S EXHIBITS NIL.

True copy

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M.N. KRISHNAN, J.

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W.P.C. NO. 17850 OF 2007

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Dated this the 19th day of October, 2007.

J U D G M E N T

This writ petition is filed against the order of the Munsiff, Alathur in E.P.32/06 in O.S.107/05. The learned Munsiff had rejected the prayer of the decree holder holding that he has not succeeded in proving that the transfer effected by the first respondent in favour of the 2nd respondent is a fraudulent transfer which is hit by Section 53 of the Transfer of property Act.

2. The suit was one for realisation of an amount due from the first respondent. Just three weeks prior to the institution of the suit and after the receipt of notice, the first respondent transferred the property in favour of 2nd respondent. An application for attachment was made along with the suit. But in view of the provisions under Order 38 a prior transferee cannot be affected by the order of the Court

even if it is passed. So, now in the execution stage a contention has been raised that the assignment deed in favour of the 2nd respondent is hit by S. 53 of the Transfer of Property Act. S.53 of the T.P. Act states that,

> "Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. It also states that it shall not impair the rights of a transferee in good faith and for consideration."

I am conscious of the fact that there cannot be any direct evidence regarding fraud. Fraud has to be inferred from the surrounding circumstances. It is also well settled that the Court cannot go into a finding of fraud on the basis of mere conjectures and surmises. So, it is the over all evidence that has to be analysed and if it is intrinsically pointing out to an inference of fraud then certainly the Court can find it out under Section 53 of the T.P. Act. Just because

a person who owe money assigns his property in favour of a third person, there is no presumption in law that it is fraudulent. If a person is indebted to two or more persons and suppose a transfer is made in favour of one of the creditors as a preferential claim, then the other creditors can contend for the position of a fraudulent nature of the transaction. In this case as correctly held by the Munsiff even a registered copy of the document is not produced, no evidence is adduced to show that it is not a bonafide transaction and that it is not for consideration. I am aware that the said burden is on the purchaser. But, in order to attract S.53 there must be primarily materials to hold that it is a transfer intended to defeat or delay creditors. When a question was put to the decree holder while he was in the box, his answer is that he had advanced the amount seeing the property of the first respondent and therefore the transfer is fraudulent. Such an inference cannot be drawn. A further reading of the cross examination also would show

that he does not know much about the transaction at all and according to him that he does not know whether a transfer was effected prior to 4.4.05. In the re-examination an attempt is made to clarify and he would depose, "..... ...."

He would also add he does not know whether consideration had been given for this transaction. So, it is only on the conjectures and surmises the decree holder is attempting to establish the nature of a fraudulent transaction as discussed by me earlier. It cannot be done. There must be some positive materials which enables the Court to infer the fraudulent nature. It is totally absent in this case from the materials available. Just because the judgment debtor has transferred the property prior to the institution of the suit, the Court cannot jump to the conclusion of a fraudulent transfer. Therefore, I find that the learned Munsiff has

properly analysed the materials available before him and arrived at a just decision and it does not call for any interference. Therefore, the writ petition is dismissed.

M.N. KRISHNAN, JUDGE.

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